Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

TERRA XXI LTD., *et al.*,
Petitioners,

v.

AG ACCEPTANCE CORPORATION, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF APPEALS FOR THE SEVENTH
DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is an appeal from the decision of the 7th District Court of Appeals of Texas under 28 U.S.C. §1257.

The question presented is whether the state court's judgment violated the U.S. Constitution's Supremacy Clause or Full Faith and Credit Clause by impermissibly modifying a confirmed Chapter 11 plan to allow foreclosure on an extinguished pre-petition deed of trust that was not preserved by the confirmed plan of Terra XXI, in violation of 11 U.S.C. § 1141(c) and the discharge injunction under 11 U.S.C. § 524, making such decisions of the state court void *ab initio. In re Pavelich,* 229 B.R. 777, 783 (9th Cir. BAP 1999).

LIST OF PARTIES

RULE 14.1(b) LIST OF PARTIES AND RULE 29.6 DISCLOSURES

PETITIONERS as Appellants and Plaintiffs below are:

Petitioner, TERRA XXI, LTD. ("XXI"), is a Texas limited family partnership consisting of twelve limited partners and whose general partner is Petitioner, VEIGEL CATTLE COMPANY ("VCC") a Texas corporation. XXI has no parent corporation and no publicly held corporation has any ownership in XXI.

Petitioners also consist of, ROBERT W. VEIGEL ("RWV"), ELLA MARIE VEIGEL ("EMV"), and STEVE VEIGEL ("SV") in their respective individual capacities.

Petitioner, VEIGEL FARM PARTNERS d/b/a Veigel Partners, ("VFP") is a Texas general partnership consisting of equal 20% interests held by: 1) Petitioner, VEIGEL CATTLE COMPANY ("VCC"), a Texas corporation owned 25% by Bill and Holly Kirk, 25% by Vicki Massey, and 50% by Petitioners, RWV and EMV; 2) Petitioner, BOB VEIGEL, INC. ("BVI"), a Texas corporation 100% owned by Petitioners, RWV and EMV; 3) Petitioner, STEVE VEIGEL, INC. ("SVI"), a Texas corporation 100% owned by Petitioner, SV; 4) Petitioner, VEIGEL-KIRK, INC. ("VKI") a Texas corporation 100% owned by Bill and Holly Kirk; and 5) Petitioner, VICKI VEIGEL, INC. ("VVI") a Texas corporation 100% owned by Vicki Massey. Petitioners VFP, VCC, BVI, SVI, VKI, and VVI have no parent corporation and no publicly held

corporation has any ownership in VFP, VCC, BVI, SVI, VKI, or VVI.

Petitioner, VEIGEL FARMS, INC. ("VFI") is a Texas corporation owned 50% by Petitioner RWV and 50% by Petitioner SV. Petitioner VFI has no parent corporation and no publicly held corporation has any ownership in VFI.

Petitioner, GRAIN CENTRAL STATION, INC. d/b/a Veigel Grain Company ("GCS") is a Texas corporation 100 % owned by Petitioners RWV and EMV. Petitioner GCS has no parent corporation and no publicly held corporation has any ownership in GCS.

Petitioner, TERRA PARTNERS ("TP") is a Texas general partnership consisting of equal 25% interests held by: 1) Williams & Veigel, Inc., ("W&V") a Texas corporation 100% owned by Petitioners, RWV and EMV; 2) Burnett & Veigel, Inc., ("B&V") a Texas corporation 100% owned by Petitioner, SV; 3) Kirk & Veigel, Inc. ("K&V"), a Texas corporation 100% owned by Bill and Holly Kirk; and 4) Massey, Kirk & Veigel, Inc. ("MK&V"), a Texas corporation owned 50% by Bill and Holly Kirk and 50% by Petitioner SV. Petitioner, TP is a successor in interest to some interests formerly held by Petitioners, VFP, VFI, and GCS. W&V, B&V, K&V, MK&V, and Petitioner TP have no parent corporation and no publicly held corporation has any ownership in W&V, B&V, K&V, MK&V or Petitioner, TP.

Collectively, the Petitioners are referred to as the "Veigel Parties".

RESPONDENTS as Appellees and Defendants below are:

Respondent, AG ACCEPTANCE CORPORATION ("AAC") is a Delaware corporation, formerly owned 100% by Respondent, AG SERVICES OF AMERICA, INC. ("ASA"), then by ASA's successor Respondent, RABO AGSERVICES, INC. ("RAS") which is now believed to be owned by RAS's successor by merger Respondent, RABO AGRIFINANCE, INC. ("RAF").

Collectively, the Respondents herein are referred to as the "Rabo Parties".

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 14.1(b) LIST OF PARTIES AND RULE 29.6 DISCLOSURES ii

TABLE OF CONTENTS v

TABLE OF CITED AUTHORITIES vii

TABLE OF APPENDICES x

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 6

Review Is Warranted To Protect Bankruptcy Court Orders, Particularly As Related To A Confirmed Plan Of Reorganization And It's Discharge Injunction, From Being Modified By State Courts In Violation Of The Supremacy And Full Faith And Credit Clauses To The U.S. Constitution. 8

Review Is Warranted To Give Guidance To Federal Courts Including Bankruptcy Court As To Their Duty To Protect Their Exclusive Jurisdiction With Respect To The Rooker – Feldman Doctrine 12

The Judgment Below Erroneously Modified The Confirmed Plan And Should Be Determined To Be Null And Void Without Any Legal Effect 16

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

Cases

Browning v. Prostok, 165 S.W.3d 336, 345-46 (Tex. 2005) 18

Elixir Indus. v. City Bank & Trust Co. (In re Ahern Enter.), 507 F.3d 817, 820-23 (5th Cir. 2007) 18, 19

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) 11

Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1078-82 (9th Cir. 2000) 6

Hamilton v. Herr (In re Hamilton), 540 F.3d 367, 376 (6th Cir.2008) 7, 12, 19

In re Burton Securities, 202 B.R. 411, 420 (S.D.Tex. 1996) 20

In re Egleston, 448 F.3d 803, 809 (5th Cir. 2006) 6, 12, 19

In re Gervin, 300 Fed. Appx. 293, 298 (5th Cir. 2008) 12, 19

In re Lee, 22 B.R. 977 979 (Bky. C.D.Cal. 1982) 8

In re McGhan, 288 F.3d 1172, 1178-1182 (9th Cir. 2002) 6, 12, 18

In re Nat'l Gypsum Co., 118 F.3d 1056 (5th Cir. 1997) 5, 6

In re Pavelich, 229 B.R. 777, 783 (9th Cir. BAP 1999) 6, 8, 12, 18

In re U.S. Brass Corp., 301 F.3d 296, 304 (5th Cir. 2002). 5

Semtek Internat'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507, 121 S.Ct. 1021, 1027, 149 L.Ed.2d 32 (2001) 7

Stoll v. Gottlieb, 305 U.S. 165, 170; 59 S.Ct. 134, 137; 83 L.Ed. 104 (1938). 4

Terra XXI Ltd. v. Ag Acceptance Corp., Not Reported in S.W.3d, 2009 WL 2168741 (Tex.App.-Amarillo 2009)(No. 07-07-0374-CV). 8

Terra XXI, Ltd. v. Harmon, 279 S.W.3d 781 (Tex.App.--Amarillo, 2007, pet.denied). 1

Statutes

11 U.S.C. § 1141(c)..... 21, 22, 23, 24

11 U.S.C. § 524..... 21, 24

28 U.S.C. § 157 (b)(2)(A), (I), or (O)..... 8

28 U.S.C. § 1738..... 10

28 U.S.C. § 687..... 10

28 U.S.C. §1257..... 2

28 U.S.C. §1738..... 9

Rules

S. Ct. Rule 14.1(g)(i) 3

Constitutional Provisions

U.S.C.A. Const. article four, clause one 4

U.S.C.A. Const., article six, clause two..... 4

TABLE OF APPENDICES

Page:

A – Order of the Supreme Court of Texas Denying Petitioners Motion for Rehearing.....A1

B - Order of the Supreme Court of Texas Denying Petitioners' Motion to Abate.....B1

C - Order of Supreme Court of Texas Denying Petition for Review.....C1

D - Opinion of the 7th District Court of Appeals..... D1

E - Order of the state district court granting partial summary judgment against Petitioners E1

OPINION BELOW

TRIAL COURT'S DISPOSITION:

A partial summary judgment was entered by the trial court on February 8, 2006, (App E-1) which interpreted provisions of Terra XXI Ltd's confirmed Chapter 11 plan of reorganization to uphold Respondents' original pre-petition loan documents, deny Petitioners' homestead claim, and uphold Ag Acceptance Corporation's non-judicial foreclosure sale and title, whereupon claims against the substitute trustee, Mark W. Harmon were severed and appealed.[1] Thereafter, approximately six partial summary judgments were entered in favor of Respondents. The remaining three limited contested issues proceeded to jury trial in April 2007, at which a directed verdict was granted to Respondents on one issue and the jury found for Respondents on the two remaining issues. Thereafter, Petitioners' motions to modify judgment and for new trial were denied and Petitioners appealed the various partial summary judgments to the Court of Appeals for the Seventh Judicial District of Texas at Amarillo.[2]

COURT OF APPEALS' DISPOSITION:

The judgment of the trial court was affirmed in a July 21, 2009 memorandum opinion by Justice

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[1] *Terra XXI, Ltd. v. Harmon, 279 S.W.3d 781 (Tex.App.--Amarillo, 2007, pet.denied).*

[2] *Terra XXI Ltd. v. Ag Acceptance Corp.*, Not Reported in S.W.3d, 2009 WL 2168741 (Tex.App.-Amarillo 2009)(No. 07-07-0374-CV).

Hancock. (App. D-1) Petitioners' motion for rehearing was overruled on October 7, 2009.

TEXAS SUPREME COURT'S DISPOSITION:

Petitioners filed a discretionary petition for review with the Texas Supreme Court on January 25, 2010. The petition for review was denied on March 5, 2010. (App. C-1) Petitioners filed a timely motion for rehearing on April 9, 2010. On May 13, 2010, Petitioners filed a Motion to Abate Proceedings pending the disposition of Petitioners' Motion to Reopen Case filed with the bankruptcy court on May 13, 2010. The Motion to Abate Proceedings was denied by order dated May 21, 2010. (App B-1) On June 18, 2010, the court denied Petitioners' motion for rehearing.[3] (App. A-1).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257.

STATUTES AND REGULATIONS INVOLVED

Article IV, Clause 1 of the Constitution of the United States which states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general

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[3] This petition is filed within 90 days of the denial of Petitioners' motion for rehearing by the Texas Supreme Court. The bankruptcy court subsequently declined to reopen Terra XXI's bankruptcy case by order entered September 1, 2010.

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Article VI, Clause 2 of the Constitution of the United States which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 157 (b)(2) (A), (I), or (O) which states:

(b)(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(I) determinations as to the dischargeability of particular debts;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

28 U.S.C. §1257(a) which states:

Final judgments or decrees rendered by the highest court of a State in which a

decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1738 which states in part:
Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

11 U.S.C. § 524 which states in part:
(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under

section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

(g)

(1)

(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

11 U.S.C. § 1141(c) which states in part:

> (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

STATEMENT OF THE CASE

This suit involves Petitioners' action to try title to cancel a deed of trust extinguished by Terra XXI Ltd.'s confirmed Chapter 11 plan of reorganization and to cancel the substitute trustees' deed to Ag Acceptance Corporation resulting from a September 2, 2003 non-judicial foreclosure (with a $20,000 credit bid subject to superior encumbrances exceeding $3.0 million acquired by Respondents on such contested deed of trust) and for wrongful foreclosure concerning approximately 8.8 sections (5,662.88 acres) valued at over $5.7 million in Deaf Smith County, Texas.

To comply with S. Ct. Rule 14.1(g)(i), Petitioners first set forth the argument that AAC's violated XXI's Plan by failing to satisfy the condition precedent necessary to be allowed a new second lien on Terra XXI's property in response to Respondents' first motion for partial summary judgment and Petitioners' own motion for partial summary judgment on which the trial court ruled on February 8, 2006. On appeal to the Amarillo Court of Appeals,

Petitioners' Point of Error No. 2 was that the trial court misinterpreted XXI's Plan. Then in Petitioners' motion for rehearing, Petitioners expressly raised the issue by stating:

> NEW ISSUE: BANKRUPTCY JURISDICTION IS EXCLUSIVE, AND APPELLANTS DEMONSTRATE THAT THE TRIAL COURT'S SUMMARY JUDGMENT IS VOID *AB INITIO* FOR LACK OF JURISDICTION
>
> Simply put, neither the trial court, nor this Honorable Court, have subject matter jurisdiction to modify Terra XXI Ltd.'s ("XXI") confirmed Chapter 11 plan of reorganization ("XXI'S PLAN").[1] Because the summary judgment of the trial court, (upheld by this Court's Memorandum Opinion), undoubtedly modifies XXI'S PLAN, and upholds Appellees' non-judicial foreclosure of an admitted "*third or fourth lien*" deed of trust *not provided for in XXI'S BANKRUPTCY PLAN*, then such judgments are automatically void *ab initio*.[2] Not only does XXI'S PLAN and the related discharge bankruptcy injunction order support the doctrine of *res judicata*, but any modification of XXI'S PLAN by the Trial Court or this Court would also violate the Supremacy and Full Faith and Credit clauses of the United States Constitution. See, *U.S.C.A. Const.*, article six; *U.S.C.A. Const. article* four, section one; *Stoll v. Gottlieb, 305 U.S. 165, 170; 59 S.Ct. 134, 137; 83 L.Ed. 104 (1938)*.[footnotes omitted].

Petitioners' subsequently raised the issue again in its petition for review to the Texas Supreme Court as Point of Error One. Petitioners also raised the issue in its motion for rehearing to the Texas Supreme Court.

REASONS FOR GRANTING THE PETITION
ISSUE ONE: [Restated]

FIRST REASON:
Review Is Warranted To Protect Bankruptcy Court Orders, Particularly As Related To A Confirmed Plan Of Reorganization And It's Discharge Injunction, From Being Modified By State Courts In Violation Of The Supremacy And Full Faith And Credit Clauses To The U.S. Constitution.

Actions pertaining to the implementation or execution of the plan and to enforce orders of the bankruptcy court are core proceedings under 28 U.S.C. § 157 (b)(2)(A), (I), or (O) because they call on a bankruptcy court to construe and enforce its own orders to ensure that the essential purposes of the confirmed plan and discharge are not undermined. *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1064 (5th

Cir. 1997) and *In re U.S. Brass Corp.*, 301 F.3d 296, 304 (5th Cir. 2002).

A state court has concurrent jurisdiction in a subsequent action based upon an alleged default of a confirmed plan and can correctly interpret and enforce the plan under state contractual law principles. However, when a state court incorrectly interprets or effectively ignores a prior bankruptcy court order, including a confirmed plan, the state court infringes on the core jurisdiction of the bankruptcy court and is deprived of subject matter jurisdiction to modify the bankruptcy court's order and to do so renders such judgment void *ab initio*. *In re Nat'l Gypsum Co., 118 F.3d 1056, 1064 (5th Cir. 1997)*, *In re Pavelich,* 229 B.R. 777, 783 (9th Cir. BAP 1999), *Gruntz v. County of Los Angeles (In re Gruntz),* 202 F.3d 1074, 1078-82 (9th Cir. 2000), *In re McGhan,* 288 F.3d 1172, 1178-1182 (9th Cir. 2002),

In re Egleston, 448 F.3d 803, 809 (5th Cir. 2006), *Hamilton v. Herr (In re Hamilton),* 540 F.3d 367, 376 (6th Cir.2008).

The Full Faith and Credit Act, 28 U.S.C. § 1738, implements the The Full Faith and Credit Clause, 28 U.S.C. § 1738, has been interpreted to require state courts to give full effect to federal court judgments. See, *Stoll v. Gottlieb,* 305 U.S. 165, 170-71, 59 S.Ct. 134, 83 L.Ed 104 (1938). In *Stoll,* this Court recognized that Congress enacted a statute (28 U.S.C. § 687) having a broader authority than that granted by Article IV, Section 1 of the Constitution. Judgments and decrees of federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts. 305 U.S. at 170. *Stoll* held that the state court had erred in not giving *res judicata* effect to a bankruptcy court order cancelling a guaranty. See also, *Semtek Internat'l*

Inc. v. Lockheed Martin Corp., 531U.S. 497,507, 121 S.Ct. 1021, 1027, 149 L.Ed.2d 32 (2001) ("[W]e have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes.").

Under the Supremacy Clause, the federal courts have the power to correct an erroneous state court judgment or to uphold a prior federal court judgment. See, *In re Pavelich,* 229 B.R. 777, 782 (9th Cir. BAP 1999) ("One consequence is that a federal court need not give full faith and credit to state court judgments to the extent that they are void under § 524(a)(1)"). See also, *In re Lee,* 22 B.R. 977, 979 (Bky. C.D.Cal. 1982) (invalidating California exemption statute that conflicted with exemptions under Bankruptcy Code under Supremacy Clause). As explained below, the state courts failed to give full

faith and credit to the provisions of Terra XXI's confirmed Chapter 11 plan. Under the Supremacy Clause, this Court has the power on direct review to correct the errors made by the Texas state courts.

SECOND REASON:
REVIEW IS WARRANTED TO GIVE GUIDANCE TO FEDERAL COURTS INCLUDING BANKRUPTCY COURT AS TO THEIR DUTY TO PROTECT THEIR EXCLUSIVE JURISDICTION WITH RESPECT TO THE ROOKER – FELDMAN DOCTRINE

This Case serves as a prime example of the procedural risks that debtors still face in asserting the affirmative rights provided by their confirmed plans and the related discharge injunction. Debtors and related interests can assert their affirmative rights in subsequent state court actions as Petitioners have done. However, final resolution of such state court actions can take years as in this case. In the meantime, the state court actions can spawn other actions such as the deficiency and other

judgments related to the Case below in both state and federal courts which essentially treat the first state court action as *res judicata* instead of following the prior confirmed plan and orders of the bankruptcy court .

Debtors seeking the "fresh start" provided by their confirmed plans commonly do not have the resources to defend their affirmative rights from aggressive well-capitalized creditors seeking to avoid undesired bankruptcy outcomes. As such, debtors and related interests may have to concentrate their limited resources on defending their rights in non-bankruptcy courts as Petitioners have been forced to do.

However, a debtor (or related party) faces two risks if he seeks to bring an additional action to seek relief from the bankruptcy court. First, is the risk that the bankruptcy court will abstain and deny

reopening debtor's case as a result of the passage of time and/or on the basis that relief is available in the pending action. Second, if a judgment is entered in a state court action, the debtor risks that the bankruptcy court will abstain on the basis of the Rooker – Feldman Doctrine. As was recently the situation in this Case, a bankruptcy court may exercise its discretion and simply refuse to reopen a debtor's case. Once a state court judgment is entered, as in the case of the February 8, 2006 partial summary judgment for Respondents, some federal courts, including Terra XXI's bankruptcy court, are mindful of the Rooker-Feldman Doctrine that precludes such court from effectively sitting as an appellate court to the state court judgment.

Even after *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005), there is a continued split among federal courts as to whether or

not the Rooker-Feldman Doctrine requires a bankruptcy court to abstain from asserting its jurisdiction even when asked to interpret and enforce its own prior orders as the bankruptcy court did in this Case on September 1, 2010.

Other courts recognize the limits of the Rooker-Feldman Doctrine and the exception to a bankruptcy court's exclusive jurisdiction. See, *In re Pavelich*, 229 B.R. 777, 783 (BAP 9th Cir. 1999); *In re McGhan*, 288 F.3d 1172, 1178-82 (9th Cir. 2002); *In re Egleston*, 448 F.3d 803, 809 (5th Cir. 2006); *In re Hamilton*, 540 F.3d 367, 372-76 (6th Cir. 2008); *In re Gervin*, 300 Fed. Appx. 293, 298 (5th Cir. 2008).

This Court should grant review to not only clearly establish the supremacy of federal bankruptcy law and to protect the exclusive jurisdiction of federal bankruptcy courts, but also to

provide guidance to state and federal courts including bankruptcy courts, creditors, debtors, and other parties as to the necessity to seek clarification exclusively from the bankruptcy court in correctly interpreting, implementing, and enforcing confirmed plans.

If other courts are free to effectively ignore the bankruptcy court's orders and discharge injunction to effectively modify a confirmed plan, then there can be no effective application of uniform federal bankruptcy law and the integrity of the bankruptcy system is undermined. Unsatisfied creditors would be not be deterred from bringing a post-confirmation action in state court hoping for more relief than provided by the confirmed bankruptcy plan.

THIRD REASON:
The Judgment Below Erroneously Modified The Confirmed Plan And Should Be Determined To Be Null And Void Without Any Legal Effect

Terra XXI's confirmed Chapter 11 plan ("XXI's Plan") and the order confirming XXI's Plan expressly provided that First Ag Credit ("FAC") was to be allowed the new first lien, Respondents were to be allowed a combined new second lien, and Diversified Financial Services ("DFS") retained its judgment lien reprioritized as the third lien on all of Terra XXI's real property, including an additional undivided interest in New Mexico as new collateral not previously mortgaged to either FAC[4] (or to Respondents).

XXI's Plan did not provide for any lien on Terra XXI's real property inferior to DFS's allowed third lien. However, subsequent to the February 8, 2006 partial summary judgment, Respondents

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[4] 1st lien mortgage denied as to undivided interest in New Mexico acquired by Terra XXI in 1999 in order entered on February 1. 2010 in Cause No. D-1010-CV-2007000111 in

admitted at trial that AAC had non-judicially foreclosed subject to superior liens, including DFS's third lien which AAC had accounted for by discounting its credit bid by approximately $3.5 million. Respondent, Rabo Agrifinance Inc. ("RAF") subsequently purchased the superior debts, but refused to collect from Terra XXI's property foreclosed on by AAC. Instead , RAF obtained deficiency and other judgments against Terra XXI and other Petitioners which would have been satisfied from the property that AAC had previously foreclosed on which was the primary collateral for the debts.

It is undisputed that Respondents posted both of their original deeds of trust for foreclosure and that AAC foreclosed on its pre-petition deed of trust

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the Tenth Judicial District Court, Quay County, New Mexico, Hon. Drew D. Tatum presiding.

subject to DFS's third lien. As such, the Texas courts erred in upholding AAC's foreclosure on the deed of trust by incorrectly construing and impermissibly modifying the confirmed plan of Terra XXI, which only allowed a combined new second lien upon satisfaction of the condition precedent requiring the execution of a single new note by Terra XXI and Veigel Farm Partners and a single new second lien of all of Terra XXI's real estate. Such new second lien was not expressly required to be a deed of trust with a power of sale given that such deed of trust is not applicable to Terra XXI's New Mexico property which under New Mexico law required a "regular" mortgage lien without the power of non-judicial sale.[5]

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[5] Both First Ag Credit as the holder of the Class Three first lien claim, and Respondents as the holder of the Class Four second lien claim attempted to comply with Section 8.07 of XXI's Plan prior to the effective date of XXI's Plan by submitting documents for execution. However, the documents did not comport with the provisions of XXI's Plan and Veigel Farm Partner's confirmed Plan ("VFP's Plan") as to substance

Section 8.07 of XXI's Plan contained a redocumentation provision that required holders of allowed claims to provide new "loan documents" with the exception of DFS which was expressly allowed by XXI's Plan to keep its prepetition judgment liens:

> "Holders of claims allowed as secured claims under this Plan *shall provide for the redocumentation* of all claims and security interests where applicable under the terms and provisions of the Plan

The allowed combined claim of Ag Services and AAC was treated in the plan as Class Four. Paragraph 4 indicated that the new defined "Ag Services Claim" *shall* be secured by the following liens which included only a single second lien on all real property owned by Terra XXI in Deaf Smith

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and form and were rejected and never executed. Yet, neither First Ag Credit nor Respondents sought relief from the bankruptcy court to protect their interests in the allowed secured claims. Instead Respondents took subsequent actions based on the original loan documents since there were no new loan documents as contemplated by XXI's Plan and VFP's Plan.

County, Texas and Quay and Guadalupe Counties, New Mexico which was to include Terra XXI's interest in New Mexico not previously mortgaged to Respondents.

Under well established bankruptcy law, the deed of trust that AAC used to non-judicially foreclose on and gain title to Terra XXI's real property in Texas was not preserved by and was in violation of XXI's confirmed Plan, 11 U.S.C. § 1141(c), and the bankruptcy's court discharge injunction, 11 U.S.C. §524. *Browning v. Prostok,* 165 S.W.3d 336, 345-46 (Tex. 2005); *Elixir Indus. v. City Bank & Trust Co. (In re Ahern Enter.),* 507 F.3d 817, 820-23 (5th Cir. 2007).

Only the bankruptcy court had jurisdictional authority to modify XXI's confirmed plan, and the state court's decision usurped the bankruptcy court's exclusive core jurisdiction under Chapter 11 of the

Bankruptcy Code. See, *In re Pavelich*, 229 B.R. 777, 783 (BAP 9th Cir. 1999); *In re McGhan*, 288 F.3d 1172, 1178-82 (9th C ir. 2002); *In re Egleston*, 448 F.3d 803, 809 (5th Cir. 2006); *In re Hamilton*, 540 F.3d 367, 372-76 (6th Cir. 2008); *In re Gervin*, 300 Fed. Appx. 293, 298 (5th Cir. 2008).

The Fifth Circuit's decision in *Ahern* demonstrates the error committed by the trial court (as affirmed by the court of appeals and Texas Supreme Court in denying Petitioner's petition for review). In *Ahern,* the 5th Circuit held that upon confirmation, even though Elixir was allowed a claim, Elixir's prepetition judgment lien was voided under the "default rule" of 11 U.S.C. § 1141(c) that such lien must be expressly preserved in the plan or otherwise is extinguished upon confirmation. Like Respondents below, Elixir argued that the bankruptcy court's confirmed plan merely

reclassified its claim for the purposes of distribution, which did not affect its prior judgment lien.

The 5th Circuit rejected this argument, holding that under § 1141(c), "the confirmation of a Chapter 11 plan voids liens on property dealt with by the plan *unless they are specifically preserved,* if the lien holder participates in the reorganization." 507 F.3d at 820. See also, *In re Burton Securities,* 202 B.R. 411, 420 (S.D.Tex. 1996) (confirmation of plan extinguishes lien where plan makes no provision for preservation of the lien).

Here, it is clear that Respondents' prepetition liens were not expressly preserved by XXI's confirmed plan, in contrast to the DFS lien. It is clear that the Texas courts incorrectly interpreted and modified XXI's Plan to uphold Ag Acceptance Corporation's ("AAC") foreclosure on a lien that was not expressly preserved under Terra XXI's confirmed

plan, in violation of 11 U.S.C. § 1141(c) and the discharge injunction under 11 U.S.C. § 524. Respondents did not merge their interests as evidenced by the fact that Respondents posted both ASA's original second and AAC's third lien deeds of trusts for foreclosure and only foreclosed on AAC's original third lien. As such, the state court clearly modified XXI's Plan to uphold AAC's prior non-judicial foreclosure on a lien not contemplated by XXI's Plan. When the state court held in its February 8, 2006 partial summary judgment that Respondents original loan documents were not extinguished, such judgment, and not XXI's Plan, served as *res judicata*, to subsequent deficiency and other judgments against Terra XXI and other Petitioners.

The decision of the Texas courts conflicts with the cited provisions of the Bankruptcy Code, as well

as federal bankruptcy decisions recognizing that the state courts lack authority to modify confirmed plan provisions, which lies within the exclusive province of the bankruptcy court.

For these reasons, a petition for certiorari should issue.

CONCLUSION

For all of the foregoing reasons set forth herein, Petitioners request this Court to grant their Petition for A Writ of Certiorari, and reverse and remand for further proceedings in the Texas courts.

Respectfully submitted,

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** Counsel of Record*

APPENDIX

APPENDIX A – Order of the Supreme Court of Texas Denying Petitioners Motion for Rehearing Filed June 18, 2010

THE SUPREME COURT OF TEXAS

Orders Pronounced June 18, 2010

ORDERS ON MOTIONS FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0009 CHRISTOPHER GREEN v. DWAINIA ALFORD, INDIVIDUALLY, AND AS NEXT FRIEND OF AARON ALFORD AND RONALD ALFORD; from Harris County; 14th district (14-05-00407-CV, 274 SW3d 5, 07-15-08)

(Justice Guzman not sitting)

09-0979 TERRA XXI, LTD., ET AL. v. AG ACCEPTANCE CORPORATION, AG SERVICES OF AMERICA, INC. AND THEIR SUCCESSOR, RABO AG SERVICES, INC.; from Deaf Smith County; 7th district (07-07-00374-CV, ___ SW3d ___, 07-21-09)

APPENDIX B - Order of the Supreme Court of Texas Denying Petitioners' Motion to Abate

Filed May 21, 2010

THE SUPREME COURT OF TEXAS

Orders Pronounced May 21, 2010

THE MOTION IN THE FOLLOWING CASE IS DENIED:

09-0979 TERRA XXI, LTD., ET AL. v. AG ACCEPTANCE CORPORATION, AG SERVICES OF AMERICA, INC. AND THEIR SUCCESSOR, RABO AG SERVICES, INC.; from Deaf Smith County; 7th district
(07-07-00374-CV, ___ SW3d ___, 07-21-09)
motion to abate denied

APPENDIX C - Order of Supreme Court of Texas
Denying Petition for Review
Filed March 5, 2010

FOR THE STATE OF TEXAS FILED JULY 21, 2009

THE SUPREME COURT OF TEXAS

Orders Pronounced March 5, 2010

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

09-0882 JERRY WANZER v. CHRISTINA HERNANDEZ, ET AL.; from Karnes County; 4th district (04-08-00368-CV, ___ SW3d ___, 07-15-09)

09-0979 TERRA XXI, LTD., ET AL. v. AG ACCEPTANCE CORPORATION, AG SERVICES OF AMERICA, INC. AND THEIR SUCCESSOR, RABO AG SERVICES, INC.; from Deaf Smith County; 7th district (07-07-00374-CV, ___ SW3d ___, 07-21-09)

APPENDIX D - Opinion of the 7th District Court of Appeals

Dated July 21, 2009

NO.

No t Reported in S.W.3d, 2009 WL 2168741
(Tex.App.-Amarillo)

Briefs and Other Related Documents
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Amarillo.
TERRA XXI LTD., et al., Appellants
v.
AG ACCEPTANCE CORPORATION, et al., Appellees.

No. 07-07-0374-CV.
July 21, 2009.

From the 222nd District Court of Deaf Smith County; No. CI-04B-011; Roland Saul, Judge.
Van W. Northern, Northern Law Firm, Amarillo, for appellants.

Thomas C. Riney, Riney & Mayfield L.L.P., Amarillo, Barbara Whiten Balliette, Clifford H. Walston, Michael S. Truesdale, William T. Reid, IV, Diamond McCarthy, LLP, Austin, for appellees.

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

MEMORANDUM OPINION

MACKEY K. HANCOCK, Justice.

Background

*1 In 1998, Ag Services of America, Inc. (Ag Services) provided a series of loans to Veigel Farm Partners (VFP), Grain Central Station, and Terra XXI, Ltd. (Terra). In exchange for the funds, Terra granted a deed of trust to property located in Deaf Smith County in favor of Ag Acceptance Corporation (AAC) as collateral. In 2000, Terra and VFP defaulted on the loan and filed for bankruptcy, which culminated in a bankruptcy plan of reorganization for VFP's and Terra's debt ("reorganization plans"), including the outstanding Ag Services's loans. On October 20, 2002, as part of the bankruptcy proceedings, VFP and Terra submitted Agreed Orders on Objection of Ag Services to the reorganization plan ("Agreed Orders") in each of the two bankruptcy cases which were approved by the bankruptcy court.[FN1] Based on the Agreed Orders, the parties entered into Agreed Settlements. The remaining appellants, Veigel Cattle Company, Bob Veigel, Inc., Steve Veigel, Inc., Vicki Veigel, Inc., Veigel-Kirk, Inc., Veigel Farms, Inc., Bob Veigel, individually, Steve Veigel, individually, and Grain Central Station, Inc. delivered to Ag Services guaranty agreements as part of the settlement agreements.[FN2] In the Agreed Orders, Ag Services's claims were secured by a second lien on all real property owned by Terra in Deaf Smith County.

FN1. The reorganization plan and Agreed Order for each company are separate from the other company. However, because the language contained in the documents for Terra and VFP are virtually identical,

we will collectively refer to the two companies' documents as the reorganization plans and Agreed Orders.

FN2. Some documents relating to the settlement agreement, such as ratification of guaranty and clarifying orders, were signed on later dates, however, all documentation provided October 20, 2002 as the effective date for the agreements.

In 2003, Terra failed to make a loan payment to First Ag Credit, a superior lienholder, which was a condition of the settlement agreement with Ag Services. Further, Ag Services gave notice that the ad valorem taxes on the properties were also overdue. The settlement agreements stated that a default by Terra would constitute a default by VFP. Hence, Ag Services, believing that Terra and VFP had defaulted per the settlement agreement, sent out notices of default on June 16, 2003. A month later, on July 17, 2003, Ag Services sent out notices of acceleration confirming that, because of the failure of Terra and VFP to remedy the default conditions, the indebtedness to Ag Services was due and payable. Finally, on August 12, 2003, Ag Services sent Terra and VFP notice of a foreclosure sale of the Deaf Smith property set for September 2, 2003.[FN3] At the foreclosure sale, the encumbered property was purchased by AAC for $20,000. After Robert Veigel and Ella Veigel, who resided on the property, refused to surrender the property, AAC initiated a forcible detainer action in justice court to which appellants responded with a suit in district court alleging,

among other acts, wrongful foreclosure on the property. Appellants' suit named Ag Services, AAC, and Mark Harmon (substitute trustee) as defendants. The named defendants filed a motion for summary judgment which prompted appellants to file a motion for partial summary judgment. Harmon requested and was granted a severance of the cases. Harmon then filed for summary judgment which was granted. Appellants appealed but this court affirmed the trial court. *Terra XXI, Ltd. v. Harmon,* 279 S.W.3d 781 (Tex.App.-Amarillo 2007, pet. denied). By separate orders, the trial court granted summary judgment in favor of Ag Services and AAC while denying the appellants' motion for partial summary judgment.

FN3. The foreclosure notice specified that the foreclosure sale was proceeding under the deed of trust executed by Terra with AAC as the beneficiary. AAC is an Ag Services-related financing company represented by the same law firm as Ag Services's counsel. Hence, the notices of default, acceleration, and foreclosure were actually sent out on behalf of both Ag Services and AAC.

*2 In the present case, appellants appeal raising seven issues. By the first three issues, appellants contend that the trial court erred in denying their summary judgments and granting appellees' summary judgments because: (1) the statute of limitations had run on the deed of trust, thereby negating the foreclosure sale; (2) the Agreed Orders required redocumentation of the pre-bankruptcy notes and deed of trust liens; and (3) appellees failed

to show that there were no genuine issues of material fact regarding the foreclosure claims. Next, as issues four through seven, appellants contend that the trial court erroneously granted appellees' summary judgment becau se the trial court erred in: (4) dismissing appellants' claims of deceptive trade practices, predatory lending, usury, tortious interference, and failure to perform an accounting of the financial dealings between the parties; (5) failing to recognize appellants' claims of fraudulent inducement and their right to elect remedies upon appellees' breach of the settlement agreement; (6) requiring appellants to deposit all checks jointly payable to defendants into the court registry when appellants had the right to go to a jury on that question; and (7) failing to recognize Robert and Ella's homestead interest in the encumbered property. We affirm.

Issue One: Statute of Limitations

When both parties move for summary judgment and the trial court grants one motion and denies the other, the appellate court reviews the summary judgment evidence of both parties, determines all questions presented, and renders the judgment that the trial court should have rendered. *Bradley v. State ex rel. White,* 990 S.W.2d 245, 247 (Tex.1999).

On the first issue, appellants contend that Ag Services began foreclosure procedures in August 2003, more than four years after the stated January 31, 1999 "maturity date" on the face of the deed of trust and, thus, the foreclosure was barred by the statute of limitations. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 16.035 (Vernon 2002). Further,

appellants contend that the lien extension agreement signed on August 14, 2003, cannot revive the lien that had already been extinguished prior to execution of the lien extension agreement. In contrast, appellees contend that, during the bankruptcy proceedings, the parties agree to an extended payment schedule and thereby extended the maturity date on the obligations.

By the terms of the extension agreement, the agreed effective date of the lien extension was October 21, 2002. An agreement between litigating parties is contractual. *See Wagner v. Wa rnasch,* 156 Tex. 334, 295 S.W.2d 890, 893 (1956). In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983). Considering that appellants were proceeding in bankruptcy and that the parties anticipated the settlement agreements to be binding in accordance with the Agreed Order of October 2002, we hold that the lien maturity date was extended and, thus, the deed of trust maturity date was also extended. Therefore, we find that the trial court did not err in denying appellants' Motion for Summary Judgment and granting appellees' Motion for Summary Judgment by determining that the Lien Extension Agreement did extend the Deed of Trust and that the foreclosure proceeding was not barred by the statute of limitations. We overrule appellants' first issue.

Issues Two and Three: Redocumentation and Appellees' First Motion for Summary Judgment

*3 In reviewing a traditional summary judgment: (1) the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in favor of the nonmovant. *Am. Tobacco Co. v. Grinnell,* 951 S.W.2d 420, 425 (Tex.1997) (*citing Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548-49 (Tex.1985)).

Appellants' next two issues have previously been addressed by this court. *See Terra XXI,* 279 S.W.3d at 786. In issue two, appellants contend that the reorganization order in the bankruptcy court extinguished appellants' debt and required a new note and deed of trust. However, we have previously held that the reorganization plans did not extinguish the debt. *See id.* We reaffirm that position.

Likewise, on issue three, appellants contend that the trial court erred in granting appellees' motion for summary judgment because genuine issues were raised. Specifically, appellants contend that (a) foreclosure was wrongful and the foreclosure notices were inadequate; (b) ad valorem taxes were timely paid; (c) appellees failed to inform appellants of the exact amount owing; (d) the foreclosure sales price was inadequate, and (e) the trial court failed to recognize Robert and Ella's homestead rights. This issue has been extensively discussed in our previous opinion and we continue to hold that considering the

evidence in favor of the nonmovant there are no genuine issues of material fact considering the notice given, the payment of the ad valorem taxes, the amount owing, the adequacy of the sales price, nor on the issue of homestead rights. *See Terra XXI*, 279 S.W.3d at 786-789. We overrule appellants' second and third issues.

Issue Four: Granting of Appellees' Fourth Motion for Summary Judgment

Next, appellants contend that the trial court erred in dismissing appellants' claims of deceptive trade practices, predatory lending, usury, tortious interference, and failure to perform an accounting of the financial dealings between the parties by granting appellees' fourth motion for summary judgment. Appellants' complaints break down into four sub-issues: (a) the timeliness of appellees' Fourth Motion for Summary Judgment; (b) appellees' failure to properly raise affirmative defenses in its Second Amended Answer instead of in a motion for summary judgment; (c) the appropriateness of requesting the deposit of jointly payable checks into the court registry; and (d) the court's granting of appellees' no-evidence summary judgment on appellants' post-settlement usury claim.

(A) Timeliness of Appellees' Fourth Motion for Summary Judgment

Appellants contend that the trial court erred in granting appellees' fourth motion for summary judgment because "without leave of court, without a motion to alter the scheduling order of this court, and without even an order set ting hearing, Defendant/Appellees were allowed over

Plaintiffs/Appellants' Motion to Strike, to inject new matters.... Appellants should not have been required to respond to such matters absent a motion for leave of court." However, appellants have failed to point toward any evidence of a hearing or ruling on Appellants' Motion to Strike. TEX.R.APP. P. 33.1. Appellants have made no showing of surprise or prejudice by appellees' failure to obtain leave of court to file a late pleading. In fact, appellants presumably benefitted by the trial court's practice of allowing filing without leave of court because they filed a Motion for Summary Judgment after the expiration of the deadline stated by appellants. In the absence of a sufficient showing of surprise by the opposing party, the failure to obtain leave of court when filing a late pleading may be cured by the court's consideration of the pleading. *See Patterson v. First Nat'l Bank of Lake Jackson,* 921 S.W.2d 240, 244 (Tex.App.-Houston [14th Dist.] 1996, no writ). In this case, the trial court held a hearing on January 12, 2007 and "[a]fter considering the motions, responses, evidence, and arguments of counsel" issued an order on Appellees' Fourth Motion for Summary Judgment. We conclude that the trial court did not err in considering Appellees' Fourth Motion for Summary Judgment.

(B) Appellees' Failure to Raise Affirmative Defenses in Amended Answer instead of Summary Judgment Motion

**4* Next, appellants complain that appellees' motion for summary judgment raises defenses and issues that are not supported by their Second Amended Answer and that any unpled claim or defense first presented in a motion for summary

judgment should be denied. Specifically, appellants contend that appellees raised the affirmative defenses of (1) contractual defenses to usury, (2) execution of guarantees as an assumption of a "contingent obligation" not as an assumption of a debt as set forth in the *Alamo Lumber*[FN4] case, (3) "lack of consideration" to guarantors, (4) legality of appellees' action in response to appellants' claim of tortious interference with government payments, and (5) failure to provide an accounting because requested action was moot.[FN5]

FN4. *Alamo Lumber Co. v. Gold,* 661 S.W.2d 926 (Tex.1983).

FN5. Appellants also complain of the court's granting of appellees' request for summary judgment as to post-bankruptcy lien claims; however, the trial court actually denied appellees' request on this issue. Therefore, we will not address this point.

An affirmative defense is a denial of plaintiff's right to judgment even if plaintiff establishes every allegation in its pleadings. *Highway Contractors, Inc. v. W. Tex. Equip. Co.,* 617 S.W.2d 791, 794 (Tex.Civ.App.-Amarillo 1981, no writ). An affirmative defense does not rebut the factual propositions of the plaintiff's pleading. *Gorman v. Life Ins. Co. of N. A.,* 811 S.W.2d 542, 546 (Tex.1991). However, when in context, the pleadings, record of the trial proceeding, and briefs make it clear that, contrary to appellants' contention, appellees' grounds did not constitute affirmative

defenses because they directly refute appellants' claims rather than seeking an avoidance of appellants' right to judgment. Therefore, appellees' grounds contained in its fourth motion for summary judgment were not required to be contained in appellees' Amended Answer. *See* TEX.R. CIV. P. 94. Each of the grounds raised by appellees in their Fourth Motion for Summary Judgment were properly considered under a traditional summary judgment or, alternatively, as grounds for no-evidence summary judgment.

(C) Deposit of jointly payable checks into the court registry

Next, appellants' contend that appellees' request to require the deposit of jointly payable checks into the court registry is not a proper summary judgment issue but, in fact, should have been presented as a "Motion for Mandamus" or a motion to enforce a settlement. We agree with appellants that the court's order requiring appellant to deposit jointly payable checks is not a summary judgment issue; however, we disagree with appellants that the trial court treated it as a summary judgment issue. Appellants' contention is the subject of its sixth issue and is fully analyzed therewith. *See infra* Issue Six.

(D) Summary judgment on appellants' post-settlement usury claim

Appellants also contend that the trial court improperly denied appellants' Motion to Strike Defendants' No-Evidence Motion for Lack of Particularity regarding its post-settlement usury claims and, in turn, object to the appellees' no-evidence motion for summary judgment. However,

appellees also challenged appellants' post-settlement usury claims under a traditional summary judgment. Under the trial court's order on appellees' fourth motion for summary judgment, the trial court determined that "Defendants' [appellees'] motion for summary judgment, and/or in the alternative, motion for no-evidence summary judgment dismissing all of Plaintiffs' [appellants'] post-settlement usury claims is hereby GRANTED."

**5* When a t rial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex.1993). Since, appellees presented a traditional summary judgment ground that is not challenged on appeal, we will not overturn the trial court's judgment. *Malooly Bros., Inc. v. Napier,* 461 S.W.2d 119, 120 (Tex.1970). We conclude that the trial court did not err in dismissing appellants' post-settlement usury claims. Having addressed all of appellants' contentions under Issue Four, we overrule appellants' fourth issue.

Issue Five: Appellees' Second and Fifth Motions for Summary Judgment

On their fifth issue, appellants contend that the trial court erred in granting appellees' second and fifth motions for summary judgments. In appellees' Second Motion for Partial Summary Judgment, appellees stated that appellants' claim alleging violations of the Bank Holding Company Act were barred by an order from the United States Bankruptcy Court for the Northern District of Texas

and by a prior settlement agreement. Appellees' Fifth Motion for Partial Summary Judgment moved for summary judgment and challenged the damages element of appellants' breach of contract claim. Specifically, appellees allege that appellants did not demonstrate the damages suffered because appellants were seeking to revert to pre-settlement adversary claims as a measure of damages instead of seeking damages under the settlement agreement. FN6

FN6. Appellees' Fifth Motion for Summary Judgment also sought the dismissal of appellants' claims for post-settlement damages, however, the trial court did not grant appellees' request for summary judgment as to post-settlement damages.

Appellants' complaint of the trial court's granting of appellees' second and fifth motions for summary judgment is that the trial court did not allow appellants to elect to sue appellees under the underlying "released" causes of action or adversary claims, a remedy appellants believe is available to them because they claim they were fraudulently induced into the settlement agreement. Hence, appellants contend that they should be allowed to revive their adversary claims as they existed prior to the settlement agreement. Further, appellants contend that appellees did not meet their burden of negating all of their causes of action with competent summary judgment evidence and reiterate previous contentions of grossly inadequate consideration, inadequate foreclosure notices, and illegal non-judicial foreclosure sale. But, yet again, as in

appellants' third issue, we agree with the trial court that appellees successfully demonstrated that there were no genuine issues of material fact when the evidence was viewed in the light most favorable to the nonmovant. *Am. Tobacco Co.*, 951 S.W.2d at 425.

As to whether appellants should be allowed to revive adversary claims, we hold that appellants contracted away their rights to adversary claims when the parties entered into a settlement agreement defining the parties' responsibilities and remedies. *See Wagner*, 295 S.W.2d at 893; *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 422 (Tex.2000). We overrule appellant's fifth issue.

Issue Six: Order regarding joint payment checks deposited in court registry

**6* Next, appellants contend that appellees were granted summary judgment regarding monies to be deposited into the court registry.[FN7] However, the court, in ordering the monies to be deposited into the court registry, did not make any determination as to the ownership or rights associated with the monies. It is entirely permissible for a trial court to order disputed funds paid into the registry of the court until its ownership is determined if there is evidence that the funds are in danger of being lost or depleted. *Structured Captial Resources Corp. v. Arctic Cold Storage, L.L.C.*, 237 S.W.3d 890, 894 (Tex.App.-Tyler 2007, no pet.). Merely placing the funds into the court's registry does not settle the question of the ownership of the funds and, therefore, cannot be considered an order on the merits. *Id.* at 894-95. As such we do not consider the trial court's actions as an

order granting appellees summary judgment on this issue. We overrule appellants' sixth issue.

FN7. The monies were several jointly payable checks used as collateral for appellants' debt to appellees.

Issue Seven: Homestead rights of Robert (Bob) and Ella Veigel

Finally, appellants contend that the trial court erred in failing to recognize Bob and Ella's homestead rights in the foreclosed property. In support of their claim, appellants direct this court to the affidavits of Bob and Ella Veigel, dated November 16, 2004, filed in Response to Appellees' Motion for Summary Judgment. Appellants contend that these affidavits raise fact issues that prevent the granting of appellees' request for summary judgment. However, in their own response, appellants state that "upon [Bob's father's] death [the 200 acres of land] were gifted to a trust of which Bob was both a trustee and a beneficiary.... Although Bob conveyed his interest to Terra XXI Ltd., partnership, Ella never joined in the conveyance." The trial court, in its Order on Plaintiffs' and Defendants' Respective Motions for Summary Judgment, made findings of fact including that part of the disputed land (Lots 60, 61, and 62) were never owned by Bob or Ella but by the Veigel Family Trust; therefore, the court found that Bob and Ella did not have any homestead interest in that property. Further, the trial court found that another part of the disputed property, Lot 42, was owned by Bob and Ella, but that they conveyed the property to Terra by special warranty deed on November 1, 1994. Hence,

the trial court found that Bob and Ella did not possess any homestead interest in Lot 42.

Once again, when both parties move for summary judgment and the trial court grants one motion and denies the other, the appellate court reviews the summary judgment evidence of both parties, determines all questions presented, and renders the judgment that the trial court should have rendered. *Bradley,* 990 S.W.2d at 247. In Texas, in order to establish homestead rights, there must be proof of concurrence of usage and intent on the part of the owner to claim the land as a homestead. *Prince v. North State Bank of Amarillo,* 484 S.W.2d 405, 409 (Tex.Civ.App.1972, writ ref'd n.r.e .). The intent of the owner to claim the land as a homestead is to be established by competent proof at the time of the execution of the deed of trust. *See id.* at 411. If the homestead claimant contends that the property was being used in connection with his residence, the determining factor is whether the claimant's acts were such as to put a reasonable prudent person on notice that the tract constituted a part of the homestead. *Id.* As a general rule, when a homestead claimant occupies a house on a lot as a homestead, other lots used only incidentally or secondarily to home purposes are not part of the homestead. *See id.* at 410 (*citing Calvert v. Hanna,* 140 S.W.2d 976 (Tex.Civ.App.-Amarillo 1940, no writ)).

*7 In this case, appellants did not present any evidence that, at the time of conveyance from Veigel Family Trust to Terra, Bob and Ella to Terra, or from Terra to AAC, that the parties intended to reserve any homestead rights. At best, appellants'

evidence of the affidavits of Bob and Ella show an intent to claim homestead rights as of November 16, 2004. Appellants fail to cite to any other reference in the voluminous record that could demonstrate usage or the intent to retain the property as a homestead at the time of conveyance of the property to either Terra in 1994 or to AAC in 1998 and we are unable to find any such supporting evidence. *See* TEX.R.APP. P. 38.1(i); *Arredondo v. Rodriguez,* 198 S.W.3d 236, 238-39 (Tex.App.-San Antonio 2006, no pet.) (this court is not required to wade through a voluminous record to marshal appellants' proof, but it is the duty of the party to show that the record supports its contention). Hence, we conclude that the trial court did not err in finding no genuine issues of fact regarding the homestead rights to Lots 60, 61, or 62.

Finally, although appellant, Ella Veigel, contends that she did not join her husband, Bob, in the conveyance of the property, Lot 42, to Terra, the record demonstrates that, by a Special Warranty Deed signed by both Bob and Ella Veigel, the property was conveyed to Terra on November 1, 1994 without any mention of a reservation of homestead rights. Further, the fact that the Veigels may have lived in a home on Lot 61 does not change or give rise to any evidence that other lots, specifically Lot 42, which were used only incidentally or secondarily to home purposes, are part of any homestead that may have existed on Lot 61. *See Prince,* 484 S.W.2d at 410.

We conclude that the trial court did not err in its findings of fact or in granting appellees summary

judgment regarding Bob and Ella Veigel's homestead rights. We overrule appellants' seventh issue.

Conclusion

Having overruled all of appellants' issues, we affirm the trial court.

APPENDIX E - Order of the state district court granting partial summary judgment against Petitioners

Filed February 8, 2005

CAUSE NO. CI-04B-011

TERRA XXI LTD., TERRA PARTNERS, VEIGEL FARMS, INC., VEIGEL CATTLE COMPANY, ROBERT W. VEIGEL, AND ELLA MARIE VEIGEL, Plaintiffs,	§	222ND DISTRICT COURT
VS.	§	IN AND FOR
RABO AGSERVICES, INC., AG ACCEPTANCE CORPORATION, AG SERVICES OF AMERICA, INC., and MARK HARMON, Individually and as Substitute Trustee Defendants.	§	DEAF SMITH COUNTY, TEXAS

ORDER ON PLAINTIFFS' AND DEFENDANTS' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENTS

On November 23, 2004 the Court heard Defendants' Motion for Summary Judgment in the above captioned case. In addition, on September 28, 2005, the Court heard Plaintiffs' Motion for Partial Summary Judgment, reheard Defendants' Motion for Summary Judgment, and heard Defendants' Second Motion for Summary Judgment. The Court, after consideration of the moving papers, responses, evidence, and arguments of counsel, has reached the following determinations:

1. As a matter of law, the Court finds that Defendants' pre-bankruptcy liens were not extinguished by the Plan of Reorganization of Terra XXI, Ltd.	Granted	~~Denied~~

("Terra XXI Plan"), the Plans of Reorganization of Veigel Farm Partners ("VFP Plan"), or otherwise.

2. The terms of the Terra XXI Plan conclusively establish the following: Section 3.05 of the Terra XXI Plan and the seven-page Agreed Orders ("Agreed Orders") from which the plan treatment was adopted expressly provides that the Deaf Smith County property is not free and clear of all claims or interest of creditors but is in fact expressly subject to AAC's preexisting lien on the property. Granted ~~Denied~~

3. In addition, terms of the Terra XXI Plan conclusively establish the Defendants' liens were specifically preserved pursuant to section 3.04(2) of the VFP Plan, which provides that the indebtedness will be secured by liens that Ag Services held a lien on the date of bankruptcy. The VFP Plan conclusively establishes that all of said liens will be preserved and cross-collateralized. Granted ~~Denied~~

4. Section 8.07 of the Terra XXI Plan conclusively establishes that re-documentation of claims and security interests is required only where applicable under the plan. Granted ~~Denied~~

5. There is no genuine issue of material fact on the issue of whether Granted ~~Denied~~

the Terra XXI's Plan requires Defendants to re-document their claims and/or security interests. The Terra XXI Plan conclusively establishes that no such requirement is contained therein.

6. Further, the Tetra XXI Plan conclusively establishes the survival of the pre-bankruptcy Deeds of Trust in its definition of a default in Section 10(l), which defines "loan documents" to include, among other things, deeds of trust evidencing Ag Services' Claim. Granted ~~Denied~~

7. Therefore, as a matter of law, Defendants were not required to re-document their claims and/or security interests including the pre-bankruptcy Deeds of Trust. Granted ~~Denied~~

8. The Court further holds, in the alternative, that even if Section 8.07 of the Terra XXI Plan requires re-documentation, any such requirement is not contained in the Agreed Order on the Objection to Terra XXI's Plan. Such a requirement would not create a genuine issue of material fact because it would conflict with the Agreed Order. As a matter of law under paragraph 15 of the Agreed Order, in the event of any conflict between the Plan and the Agreed Order, the Agreed Order shall control. Granted ~~Denied~~

9. Because the Agreed Order does not require re-documentation, Granted ~~Denied~~

Defendants were not required to re-document their claims and/or security interests including the pre-bankruptcy Deeds of Trust.

10. It is undisputed that the Lien Extension Agreement executed effective October 21, 2002 defines "liens" to include all of Defendants' pre-bankruptcy Deeds of Trust. By its own terms, the Lien Extension Agreement extends the Deeds of Trust until the Indebtedness is paid in full. It is undisputed that the Indebtedness has not been paid in full. Granted ~~Denied~~

11. Therefore, the Court concludes that, as a matter of law, Defendants' pre-bankruptcy Deeds of Trust were not extinguished by the Plans of Reorganization of Terra XXI, Ltd., the Plans of Reorganization of Veigel Farm Partners, or otherwise. Granted ~~Denied~~

12. As a result, the Court concludes that Defendants' possessed the right to non-judicially foreclose on the Deaf Smith property pursuant to the pre-bankruptcy Deeds of Trust. Granted ~~Denied~~

13. Therefore, summary judgment is appropriate dismissing Plaintiffs' request for declaratory relief regarding the extinguishment of Defendants' pre-bankruptcy notes and deeds of trust. Granted ~~Denied~~

14. Plaintiffs' claim for wrongful foreclosure fails because no genuine issues of material fact exist to show that the foreclosure was wrongful. Granted ~~Denied~~

Adequacy of Notice

15. The record conclusively establishes that Defendants provided adequate notice to all parties entitled to receive such notice in the format agreed to by the parties, as articulated by the Agreed Orders. Specifically, Defendants provided Notice of Default, Notice of Acceleration, and Notice of Foreclosure. (Defs.' Exs. 8-11). In addition, Paragraph 11(a) of the Agreed Order further provides that notice in this format shall satisfy any and all foreclosure notices that may be required under Texas law.	Granted	Denied

Event of Default and Timing of Notices

16. In addition, it is undispute that every Veigel entity that had any obligation on the debt had actual and constructive notice of the foreclosure, and Steve Veigel himself was, in fact, present at the sale. (Defs.' Ex. 13 at 123:19-25, 71:3-5).	Granted	Denied
17. Therefore, no genuine issue of material fact exists with respect to the adequacy of notice.	Granted	Denied
18. It is also undisputed that Plaintiffs did not make the First Ag Credit payment within thirty days of the due date for that payment (or, for that matter, at any time). (Defs.' Ex. 14 at 13).	Granted	Denied
19. Therefore, the record conclusively establishes that an event of default occurred before the Notice of Default	Granted	Denied

was mailed on June 16, 2003.

20. The record conclusively establishes that paragraph 10(e) of the Agreed Order separately defines as an event of default "any modification of the payments required to be made by Debtor to First Ag Credit and/or Diversified Financial Services under the Plan." Granted ~~Denied~~

21. Plaintiffs admit, and it is undisputed, that they sought a modification of the cure date of First Ag Credit's lien. Granted ~~Denied~~

22. As a matter of law, the modification of the cure date of First Ag Credit's lien triggered an event of default as defined under paragraph 10(e) of the Agreed Order. Granted ~~Denied~~

23. Therefore, no genuine issue of material fact exists with respect to an event of default occurring prior to the mailing of notices provided by the Defendants in connection with the default and foreclosure. Granted ~~Denied~~

Ad Valorem Taxes

24. Plaintiffs admit, and it is undisputed, that they failed to pay ad valorem taxes for the year 2002 by June 16, 2003, the date of the Notice of Default. Granted ~~Denied~~

25. As a matter of law, the failure to pay ad valorem taxes for the year 2002 triggered an event of default under the Agreed Order. Granted ~~Denied~~

26. Plaintiffs allegations about payment of the taxes pursuant to the October 20, 2002 settlement agreement Granted ~~Denied~~

do not raise an issue of material fact because it was Plaintiffs' admitted failure to pay the ad valorem taxes as required under the Agreed Orders, rather than under the settlement agreement, that triggered a default.

27. Therefore, the Court concludes that no genuine issue of material fact exists with respect to the ad valorem taxes on which to contest the validity of the foreclosure. Granted ~~Denied~~

Determining Amount Due

28. Plaintiffs also argue that foreclosure was wrongful because "[p]ending the U.S. Bankruptcy Court's hearing on July 15, 2003, with Clarifying Order on October 20, 2003 [sic], it was impossible for either party to determine the amount of debt owed to Ag Services or the payment due on either July 31, 2003 or January 1, 2003." (Petition at Art. VI, ¶ D.) However, the record conclusively establishes that Plaintiffs' assertion of uncertainty with respect to the obligation to Ag Services is immaterial to the bases for default alleged in the June 16, 2003 Notice of Default letter—the failure to make payments to First Ag Credit by the due date and the failure to pay ad valorem taxes as they came due. Granted ~~Denied~~

29. Therefore, the Court concludes that no genuine issue of material fact exists with respect to determining the amount of debt owed to Defendants Granted ~~Denied~~

30. Thus, as a matter of law, the Granted ~~Denied~~

Court concludes that Plaintiffs' claim for wrongful foreclosure fails as a matter of law because no genuine issues of material fact exist to show that the foreclosure was wrongful.

Adequacy of Sales Price

31. Next, the Court notes that a claim for wrongful foreclosure contains two elements: (1) an irregularity in the foreclosure process, (2) which caused or contributed to a grossly inadequate price. As a matter of law, summary judgment is proper if Defendants negate either of these two elements. A "grossly inadequate price" means consideration so far short of the real value of the property as to shock a correct mind, and thereby raise a presumption of fraud. Granted ~~Denied~~

32. Plaintiffs have admitted that they have no evidence of any irregularities occurring that caused anyone attending the foreclosure sale to refrain from bidding on the property. (Defs.' Ex. 13 at 165; Ex. 14 at 13-15). Granted ~~Denied~~

33. It is undisputed that the foreclosure sales price on the second lien position was $20,000. It is also undisputed that there were additional, superior encumbrances in excess of $3.3 million, representing the first lien position and tax liens. Granted ~~Denied~~

34. The Court finds that Plaintiffs have alleged the property to be worth over $4.5 million. (Petition at Alt IV, D.) Granted ~~Denied~~

In addition, Plaintiffs have made other allegations that the property is worth approximately $5 million.

35. As a matter of law, prior encumbrances such as superior lien positions and tax liens, are to be taken into consideration when determining whether a sales price is grossly inadequate. Granted ~~Denied~~

36. Therefore, the Court holds that, taking into consideration additional, superior encumbrances in excess of $3.3 million, the sales price of $20,000, as a matter of law, was not grossly inadequate for the subject property. Granted ~~Denied~~

37. Thus, the Court holds that Plaintiffs claim for wrongful foreclosure fails, as a matter of law, because Defendants have negated a required element of the cause of action and no genuine issue of material fact exists with respect to the adequacy of the sales price. Granted ~~Denied~~

Claims Against Mark Harmon

38. Under Texas law, a substitute trustee can only face liability for failing to comply with the obligations imposed by Texas Property Code section 51.002. Granted ~~Denied~~

39. The Court finds that the summary judgment record conclusively establishes that adequate notice of the default and foreclosure sale was given, and thus, that the Granted ~~Denied~~

duties conferred by section 51.002 were satisfied. (Defs.' Ex. 8-9 (Notices of Default); Ex. 10 (Notice of Acceleration); Ex. 11 (Notice of Foreclosure)).

40. Therefore, the Court concludes that Plaintiffs' claims against Defendant Mark Harmon, individually or as substitute trustee, for wrongful foreclosure fail as a matter of law. Granted ~~Denied~~

Plaintiffs' Claims Previously Asserted and Subject to a Final Order of Dismissal

41. Plaintiffs' petition asserts claims for fraud, economic duress, negligence, DTPA, breach of contract, and violations of the Bank Holding Company Act, as well as a request for a declaratory judgment establishing a superior right of title based upon a theory claim that the deed was rendered void and unenforceable as procured by fraud in the inducement, etc. Granted ~~Denied~~

42. Plaintiffs previously asserted those same claims in an adversary proceeding in the United States Bankruptcy Court for the Northern District of Texas (Adversary No. 01-2007-SAF) (the "Adversary Proceeding"). Granted ~~Denied~~

43. The United States Bankruptcy Court for the Northern District of Texas dismissed those claims with prejudice. Granted ~~Denied~~

44. As a matter of law, Plaintiffs are precluded from asserting those claims in this Court in accordance with the doctrine of *res judicata* as they have already been dismissed by order of another court.	Granted	~~Denied~~
45. The *res judicata* effect of the Bankruptcy Court's prior dismissal exists independently of any contractual settlement agreement and is not subject to collateral attack based upon any purported contractual defenses or alleged breaches of the settlement agreement. Thus, any allegations relating to the settlement agreement do not raise genuine issues of material fact precluding the application of *res judicata*.	Granted	~~Denied~~
46. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claims for fraud, economic duress, negligence, DTPA, Breach of Contract, violations of the Bank Holding Company Act, and on Plaintiffs' request for declaratory judgment previously dismissed in the Adversary Proceeding.	Granted	~~Denied~~
47. In addition to the preceding claims, Plaintiffs' First Supplemental Petition arguably asserts a claim for a violation of the Texas Anti-Trust Act based upon Defendants' alleged violations of the Bank Holding Company Act ("Texas Anti-Trust Claim") (Supp.	Granted	~~Denied~~

Petition at Art. VII, ¶ J.)

48. Plaintiffs' Texas Anti-Trust Claim is subject to Defendants' Second Motion for Summary Judgment. At the hearing on September 28, 2005, Plaintiffs waived any objection to the consideration of Defendants' Second Motion for Summary Judgment as it relates to this claims. Granted ~~Denied~~

49. The Texas Anti-Trust Claim is predicated on Plaintiffs' allegations of conduct violating the Bank Holding Company Act as alleged in the Adversary Proceeding. Accordingly, the Texas Anti-Trust Claim could have been litigated in the Adversary Proceeding. Granted ~~Denied~~

50. *Res judicata* bars not only the assertion of claims that have in fact been finally litigated, it also bars the assertion of claims that could have been fully litigated in a previous action. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). Granted ~~Denied~~

51. Therefore, because Plaintiffs' Texas Anti-Trust Act claim is based upon Defendants' alleged violations of the Bank Holding Company Act as alleged in the Adversary Proceeding, the Court concludes that this claim is also barred by the doctrine of *res judicata* in that it could have been fully litigated in the previous Granted ~~Denied~~

adversary litigation

52. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' Texas Anti-Trust Claim.	Granted	~~Denied~~

Plaintiffs' Homestead Claim

53. Plaintiffs' seek a declaration that they have vested rights in certain property based upon "the homestead claims of Robert and Ella Marie Veigel." (Petition at 3.)	Granted	~~Denied~~
54. Plaintiffs assert homestead rights in property located in Sections 62, 61, 60, 59 and 42, all in Block K-4, BS&F Survey, Deaf Smith County, Texas.	Granted	~~Denied~~
55. The land located in Section 59 and the East-half (E/2) of Section 60 was not foreclosed upon by AAC and is not at issue. The only land at issue in this case is the land located in Sections 62, 61, the West-half (W/2) of Section 60, and 42.	Granted	~~Denied~~
56. The Veigels have identified no genuine issue of material fact that would establish any basis for them to claim a homestead interest in any portions of property at issue in this case.	Granted	~~Denied~~
57. Under Texas law, the establishment of homestead rights depends upon the existence of some title or interest in the property.	Granted	~~Denied~~
58. A debtor can only establish a homestead exemption if he has a possessory interest in the land on which the exemption is sought. A	Granted	~~Denied~~

remainder interest is not subject to homestead protection, because it does not entitle the owner to a right of possession.

59. As a matter of law, property held in trust cannot be impressed with homestead rights in favor of the trustee's spouse because the spouse holds no title interest in the property. Granted ~~Denied~~

60. The record conclusively establishes that the land located in Section 62, 61, and the West-half (W/2) of Section 60 was never owned by the Veigels. Granted ~~Denied~~

61. Instead, the record conclusively establishes at most that the land was once owned by the Veigel Family Trust, of which Robert Wayne Veigel was beneficiary and trustee. The record establishes that the trust conveyed the property to Terra XXI by Special Warranty Deed dated November 1, 1994. Granted ~~Denied~~

62. Because the Veigels have identified no genuine issues of material fact on which any homestead interest could attach to the land located in Section. 62, 61, and the West-half (W/2) of Section 60, and because the record conclusively establishes the absence of any such basis, the Court holds, as a matter of law, that Robert and Ella Marie Veigel possess no homestead interest in the land located in Section 62, 61, and the West-half (W/2) of Section 60. Granted ~~Denied~~

63. In addition, the record conclusively Granted ~~Denied~~

establishes that the land located in Section 42 (the only portion of the foreclosed property claimed as homestead ever owned by the Veigels) was conveyed from the Veigels to Terra XXI by Special Warranty Deed dated November 1, 1994, executed by both Robert Wayne Veigel *and* Ella Marie Veigel.		
64. Plaintiffs assertion that homestead rights in Section 42 flow from the Veigels' status as partners of Terra XXI, Ltd does not create a genuine issue of material fact sufficient to defeat summary judgment.	Granted	~~Denied~~
65. Pursuant to both the Texas Uniform Partnership Act ("TUPA") §25 and the Texas Revised Partnership Act Article 6132b-2.04 ("TRPA"), partners and their spouses possess no interest—homestead or otherwise—in partnership property. By the terms of its comments, the TRPA does not intend any substantive change in the status of the law under TUPA §25 regarding the lack of ownership in partnership property by a partner or the partner's spouse.	Granted	~~Denied~~
66. Therefore, the Veigels have identified no genuine issues of material fact from which they can assert homestead rights in Section 42.	Granted	~~Denied~~
67. Because the Veigels have failed to identify any genuine issue of material fact on which they can assert	Granted	~~Denied~~

any homestead interest in the land located in Section 42, 62, 61, and the West-half (W/2) of Section 60, Defendants are entitled to summary judgment on their claim for declaratory relief.

In addition to and consistent with the specific determinations made by the Court in this matter above, the following is therefore ORDERED, ADJUDGED AND DECREED:

Plaintiffs' Motion for Partial Summary Judgment on its claim for declaratory relief as to the extinguishment of Defendants pre-bankruptcy deeds of trust and notes is hereby ~~GRANTED~~ / DENIED;

Defendants' Motion for Summary Judgment on Plaintiffs' claim for declaratory relief as to the extinguishment of Defendants pre-bankruptcy deeds of trust and notes is hereby GRANTED / ~~DENIED~~ and Plaintiffs' claim for declaratory relief as to the extinguishment of Defendants pre-bankruptcy deeds of trust and notes IS / ~~IS NOT~~ dismissed with prejudice;

Defendants' Motion for Summary Judgment on Plaintiffs' claim for declaratory relief based upon theory of wrongful foreclosure is hereby GRANTED / ~~DENIED~~, and Plaintiffs' claim for declaratory relief based upon theory of wrongful foreclosure IS / ~~IS NOT~~ dismissed with prejudice;

Defendants' Motion for Summary Judgment on Plaintiffs' claim for wrongful foreclosure is hereby GRANTED / ~~DENIED~~,, and Plaintiffs' claim for wrongful foreclosure IS / ~~IS NOT~~ dismissed with prejudice;

Defendants' Motion for Summary Judgment on Plaintiffs' claims against Defendant Mark Harmon, individually and as substitute trustee, is hereby GRANTED / ~~DENIED~~,, and Plaintiffs' claims against Defendant Mark

Harmon, individually and as substitute trustee, ARE / ~~ARE NOT~~ dismissed with prejudice;

Defendants' Motion for Summary Judgment on Plaintiffs' claims for fraud, economic duress, negligence, DTPA, Breach of Contract, violations of the Bank Holding Company Act, and declaratory relief establishing a superior right of title based upon a theory of fraud in the inducement is hereby GRANTED / ~~DENIED~~, and Plaintiffs' claims for fraud, economic duress, negligence, DTPA, Breach of Contract, violations of the Bank Holding Company Act, and declaratory relief establishing a superior right of title based upon a theory of fraud in the inducement ARE / ~~ARE NOT~~ dismissed with prejudice;

Defendants' Second Motion for Summary Judgment on Plaintiffs' claim for violations of the Texas Anti-Trust Act is hereby GRANTED / ~~DENIED~~ and Plaintiffs' claim for violations of the Texas Anti-Trust Act IS / ~~IS NOT~~ dismissed with prejudice;

Defendants' Motion for Summary Judgment on Plaintiffs' claim for declaratory relief regarding alleged homestead interests of Robert and Ella Marie Veigel is hereby GRANTED / ~~DENIED~~, and Plaintiffs' claim for declaratory relief regarding alleged homestead interests of Robert and Ella Marie Veigel IS / ~~IS NOT~~ dismissed with prejudice.

DATED this 8th day of February, 2005[sic actual year is 2006].

/s/ Roland Saul

The Honorable Judge Roland Saul

Supreme Court, U.S.
FILED
OCT 5 - 2010
OFFICE OF THE CLERK

No. 10-380

IN THE
SUPREME COURT OF THE UNITED STATES

TERRA XXI LTD., *et al.*,
Petitioners,

v.

AG ACCEPTANCE CORPORATION, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 15.8 of this Court, Petitioners file this supplemental brief to the PETITION in order to bring a new intervening matter to this Court's attention. Since the PETITION was filed, this Court granted certiorari in *Stern v. Marshall*, No. 10-179 on September 28, 2010 that involves similar underlying factual and related legal issues as Petitioners' PETITION. For the reasons stated below, the Court should grant Petitioners' PETITION and consider Petitioners' case in conjunction with the *Stern* case.

Although the questions presented in *Stern* differ from the question presented in Petitioners' PETITION, the underlying complaint is essentially the same in both petitions. That is, both *Stern* and Petitioners essentially argue that their respective prior bankruptcy court judgments/orders control over and preclude the subsequent Texas state court judgments.[1]

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[1] *Stern* ultimately seeks to enforce the December 29, 2000 bankruptcy judgment for $449,754,134 (*see Marshall v. Marshall (In re Marshall)*, 253 B.R. 550 (Bankr.C.D.Cal. Oct. 6, 2000) *(Marshall I)* and *Marshall v. Marshall (In re Marshall)*, 257 B.R. 35 (Bankr.C.D.Cal. Dec. 29, 2000) *(Marshall II)* over parts of the judgment in the Texas probate proceedings involving the estate of J. Howard Marshall, II which became a final judgment on February 11, 2002 (*see Marshall II* at 8).

Petitioners seek to enforce Terra XXI Ltd.'s Chapter 11 plan of reorganization and permanent discharge injunction resulting from the bankruptcy court's confirmation order entered on January 11, 2002 over the February 8, 2006 partial summary judgment of the Texas district court (*see* App. E of the Petition).

The significant legal difference in the petitions is that unlike in *Stern*, there is no dispute in the Petitioners' case that the bankruptcy court had core jurisdiction to enter a final judgment in confirming Terra XXI Ltd.'s Chapter 11 plan of reorganization ("XXI'S PLAN"). Because the issues in *Stern* have evolved into whether or not the bankruptcy court had core jurisdiction to enter its final judgment on December 29, 2000, the Ninth Circuit did not reach the issue of whether the Texas probate court judgment was precluded in part by December 29, 2000 bankruptcy judgment pursuant to the Full Faith and Credit Act of 28 U.S.C § 1738. Instead, the Ninth Circuit applied the Full Faith and Credit Act to uphold the Texas probate judgment. *In re Marshall*, 600 F.3d 1037, 1061 (9th Cir. 2010).

If this Court rules in favor of *Stern* by holding that the December 29, 2000 bankruptcy court judgment was a "final" judgment, then *Stern* would be placed in the same position as Petitioners seeking to avoid the Texas court judgment on the basis of the prior bankruptcy court judgment/order.

A favorable ruling in Stern and Petitioners' case would provide guidance and strengthen the jurisdiction of bankruptcy courts over st ate courts that disregard or avoid prior judgments of bankruptcy courts as in *Stern*, or in part as in Petitioners' case. A favorable ruling in Stern and Petitioners' case would also serve to provide guidance to other federal courts, including bankruptcy courts, when they are asked to avoid a state court judgment that infringes upon a bankruptcy court's prior judgment, injunction, or exclusive core jurisdiction

particularly as to federal courts which continue to abstain under the *Rooker – Feldman* doctrine.

On the other hand, if this Court rules in favor of *Marshall* by holding that the *Stern* claim was not a core proceeding and as such the bankruptcy judgment was not a "final" judgment, then Petitioners' case would provide an illustrative contrast and guidance concerning the exclusive jurisdiction of bankruptcy courts, the application of the Full Faith and Credit Act in core and non-core bankruptcy proceedings, and the scope of the bankruptcy exception to the *Rooker – Feldman* doctrine.

If this Court holds in *Stern* that the December 29, 2000 bankruptcy judgment is a "final" judgment, there is little doubt that the Texas probate judgment conflicted with the bankruptcy judgment. The Ninth Circuit stated in *In re Marshall, Id*:

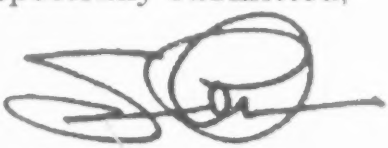
> Having already noted in our previous opinion that "[o]ur review of the trial records in the Texas probate court and in the United States district court discloses conflicting findings of fact critical to the merits of the cases of the contesting parties," *In re Marshall,* 392 F.3d at 1123, ...

As both *Stern's* and Petitioners' case illustrate, any disregard or modification of a prior bankruptcy court judgment can have far reaching and profound effects.

Petitioners pray that this Court grants Petitioners' PETITION and vacates the state court judgments. Alternately, Petitioners pray that

disposition of Petitioners' PETITION await this Court's disposition of the *Stern* case on certiorari.

Respectfully submitted,



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